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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.		
10/611,968	07/03/2003	Herve Burgaud	06028.0020-00	3634		
22852	7590	05/01/2009	EXAMINER			
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 901 NEW YORK AVENUE, NW WASHINGTON, DC 20001-4413				ELHILO, EISA B		
ART UNIT		PAPER NUMBER				
1796						
MAIL DATE		DELIVERY MODE				
05/01/2009		PAPER				

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HERVE BURGAUD, RUI PEREIRA,
and BEATRICE BELCOUR-CASTRO

Appeal 2009-1991
Application 10/611,968
Technology Center 1700

Decided:¹ May 01, 2009

Before ADRIENE LEPIANE HANLON, JEFFREY T. SMITH, and
JEFFREY B. ROBERTSON, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

Statement of the Case

This is an appeal under 35 U.S.C. § 134 from a final rejection of

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the Decided Date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

claims 1-6, 9, 10, and 12-36.² Claims 7 and 8 have been objected to as dependent upon a rejected base claim. (App. Br. 3). We have jurisdiction under 35 U.S.C. § 6.³

Appellants' invention relates to a dye composition for keratin fibers. The dye composition generates a colored keratin fiber by reacting a heteroaromatic hydrazone with an aldehyde. (Spec. [011]-[013], and [026]). Claim 1 is illustrative:

1. A dye composition for dyeing keratin fibers comprising, in an appropriate dyeing medium, at least one aldehyde precursor, at least one enzyme able to generate an aldehyde from the at least one aldehyde precursor, and at least one heteroaromatic hydrazone able to generate a colored substance by reaction with an aldehyde;

wherein the at least one heteroaromatic hydrazone is chosen from hydrazones having the formula:



wherein Ar is chosen from heterocycles with 5 or 6 links comprising at least one nitrogen atom; and condensed polycyclic heteroaromatic groups with 9 or 10 links comprising at least one nitrogen atom, and

wherein Ar can optionally be substituted on the nitrogen atoms by a substituent chosen from C₁ to C₄ alkyls, C₁ to C₄ alcohols, and C₁ to C₄ ethers.

Appellants appeal the Examiner's rejections as set forth below:

Claims 1-6, 9, 10 and 12-36 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Hoeffkes (US Patent Application Publication No.

² An oral hearing was held for this appeal on April 21 2009.

³ In rendering this decision, we have considered the Appellants' arguments presented in the Appeal Brief dated September 6, 2007 and the Reply Brief dated January 18, 2008.

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2002/0059682A1, published May 23, 2002) combined with Benshein (US Patent 3,634,013, issued January 11, 1972).

The dispositive issue before us is whether the Examiner has established that the combination of Hoeffkes and Benshein describes a dye composition that generates a colored substance by reacting a heteroaromatic hydrazone with an aldehyde generated from the reaction of an aldehyde precursor and at least one enzyme. We answer this question in the negative. Therefore, WE REVERSE.⁴

The Examiner bears the initial burden of presenting a *prima facie* case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). In order to establish a *prima facie* case of obviousness, the Examiner must show that each and every limitation of the claim is described or suggested by the prior art or would have been obvious based on the knowledge of those of ordinary skill in the art. *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988)). “[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (quoted with approval in *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007)).

The Examiner found that Hoeffkes describes a hair dyeing composition that comprises ethanol (allegedly as an aldehyde precursor), at

⁴ We select independent claim 1 as representative of the rejected subject matter. Each of the independent claims (1, 19, 32, and 36) require the components to be capable of generating a colored substance by reacting a heteroaromatic hydrazone with an aldehyde.

least one enzyme of an alcohol oxidase and at least one heteroaromatic hydrazone. (Ans. 3-4). The Examiner found that Hoeffkes teaches applying the dye composition to hair for 30 minutes. (*Id.*). The Examiner recognized that Hoeffkes does not describe the specific heteroaromatic hydrazone of the claimed invention. The Examiner relied upon Benshein for describing the claimed heteroaromatic hydrazones utilized in hair dyeing compositions. (Ans. 4). The Examiner concluded that it would have been obvious to a person of ordinary skill in the art to utilize the known heteroaromatic hydrazones of Benshein in the dye composition of Hoeffkes. (Ans. 4-5).

Appellants contend that the Examiner has not established a *prima facie* case of obviousness. (Br. 9-10). Appellants contend that Hoeffkes does not teach or suggest generating a colored substance from the use of the reaction of heteroaromatic hydrazone with an aldehyde, generated from the reaction of an aldehyde precursor and at least one enzyme. (Br. 10-11). Appellants contend that the dye mechanism of Hoeffkes is distinct from the mechanism of the claimed invention. Appellants contend that Hoeffkes is directed to a method for dyeing keratin fibers utilizing a phenol-oxidizing enzyme to produce oxygen that is utilized to oxidize a dye precursor resulting in a dye agent. (Br. 10). In contrast, the claimed invention utilizes the mechanism discussed above. (Br. 12). Appellants do not dispute that Benshein describes the heteroaromatic hydrazones utilized in the claimed invention. Rather, Appellants contend that Benshein does not remedy the differences between Hoeffkes and the claimed invention. (Br. 11).

We agree with Appellants that Hoeffkes is directed to a method for dyeing keratin fibers utilizing a phenol-oxidizing enzyme to produce oxygen that is utilized to oxidize a dye precursor resulting in a dye agent. (Hoeffkes [0001]). The Examiner has not directed us to evidence that Hoeffkes describes conditions suitable for generating a colored substance from the reaction of heteroaromatic hydrazone with an aldehyde in conjunction with dyeing keratin fibers utilizing a phenol-oxidizing enzyme. The Examiner has not directed us to specific portions of Hoeffkes that indicate an aldehyde is generated from the reaction of an aldehyde precursor and at least one enzyme. It appears the Examiner has indiscriminately selected portions of Hoeffkes, including optional components, to identify the components utilized in the claimed invention. The Examiner utilized this non-congruent disclosure to reach the unsubstantiated conclusion that Hoeffkes discloses generating a colored substance from the use of the reaction of heteroaromatic hydrazone with an aldehyde.

For the foregoing reasons and those presented in Appellants' principal Brief on Appeal, the rejection of claims 1-6, 9, 10, and 12-36 under 35 U.S.C. § 103(a) is reversed.

ORDER

The Examiner's decision rejecting claims 1-6, 9, 10, and 12-36 is reversed.

REVERSED

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